

SEP 29 1983

No. _____

ALEXANDER L STEVENS,
CLERK**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM 1983

P. P. LANGFORD, LINDA LANGFORD
 (MRS. JERRY G.) MOORE, DESIREE LYNN
 LANGFORD, MERISSA LAFAWN LANGFORD,
 SHIRLEY LANGFORD,

Petitioners,

VS.

DAVID L. JAMES AND OLLEN JAMES;
 BRUCE WRIGHT, MARY BEN WRIGHT and
 ANNA MAE STOVEALL; COMMISSIONERS
 OF THE LAND OFFICE, STATE OF OKLAHOMA;
 UNITED STATES OF AMERICA,

Respondents.

BOUNDARY SUIT

ON WRIT OF CERTIORARI TO THE
 UNITED STATES COURT OF APPEALS
 TENTH DISTRICT

PETITION FOR WRIT OF CERTIORARI

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 Counsel for Appellant.

Whether or not the Court of Appeals, in affirming this case erroneously construed Art. 3 of the Boundary Treaty of 1819, 3 Stat. 252, and erroneously applied sections 2, 4, 5, 6, and 7 of the Boundary Decree of this Court in the case of Oklahoma v. Texas, Decree of March 12, 1923, reported in 261 U.S. 340, 43 S.Ct. 376, 67 L.Ed. 687, [Appendix E, pages A57-A59],

(A) by approving the District Court's use or application of Oklahoma law in fixing the legal standard of the factual elements of an avulsion; and,

(B) by approving the District Court's selection of a boundary bank at the foot of a hill ten feet high, the foot of which hill is level with the top of the fluvial valley of the river--a rejected contention made by Oklahoma and the United States in this Court, see Oklahoma v. Texas, 260 U.S. 606, at pages 625 and 634-636, 43 S.Ct. 221, 67 L.Ed. 428, (1923).

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PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT

The petitioners pray that a writ of certiorari issue to review the opinion and judgment of affirmance of the United States Court of Appeals, Tenth Circuit, which was a review of the opinion and judgment of the United States District Court, Western District, Oklahoma.

OPINIONS BELOW

The opinion and judgment of affirmance of the Court of Appeals is reported in 701 F.2d 123. The opinion and judgment of the District Court is reported in 558 F.Supp. 737. A true and correct copy of the opinion and judgment of affirmance of the Court of Appeals is annexed to this petition as Appendix A, page A1. A true and correct copy of the opinion and judgment of the District Court is annexed to this petition as Appendix B, page A 13.

GROUNDS FOR THIS COURT'S JURISDICTION

The date of the opinion and judgment of the Court of Appeals and the time of its entry is February 28, 1983. The date of the Order denying petitioners' Motion for Rehearing and the time of its entry is July 1, 1983. These dates are stated in the official reporter, 701 F.2d 123. Appendix A is a reproduction of the slip opinion.

28 U.S.C. §1254(1) is believed to confer on this Court jurisdiction to review the judgment of affirmance by writ of certiorari.

The reviewing jurisdiction of this Court is grounded upon the proposition that the question presented and the asserted error of the Court of Appeals draw in question an erroneous construction of the Boundary Treaty of 1819, 3 Stat. 252, which fixed and established the boundary in question and also draw in question an erroneous application of the Boundary Decree of this Court in the case of Oklahoma v. Texas, Decree of March 12, 1923, reported in 261 U.S. 340, 43 S.Ct. 376, 67 L.Ed. 687, all of which is federal law. A true and correct copy of the pertinent parts of the Boundary Decree is annexed to this petition as Appendix D, page A53, and pertinent parts of the Boundary Decree is annexed as Appendix E, page A56.

The case of Cissna v. Tennessee, 246 U.S. 289, 38 S.Ct. 306, 62 L.Ed. 720, 1918, is also relied upon by petitioners to sustain this Court's reviewing jurisdiction.

If federal law fixes the legal standard of the factual elements of an avulsion, as that term is used and intended in the above mentioned Boundary Decree, since the Court of Appeals approved of the use of Oklahoma law, a federal question is presented for review in order that a "correct application of the rule to changes in the [Red River] is necessary in order that proper effect may be given to the [Boundary Treaty of 1819] by which [Red River] was established as an interstate boundary, and hence this is a question of federal law." Cissina, supra, 246 U.S. at page 296. (Emphasis added.)

In effect, if federal law must measure the facts which constitute the action of Red River with respect to the changes of its bed and banks in order that proper effect therefrom can be given to the Boundary Treaty of 1819, a federal question is presented that will ground this Court's reviewing jurisdiction.

The question of the jurisdiction of this Court to review this case coalesces with the appellate merit questions.

The Provisions of the Boundary Treaty, Boundary Decree, Oklahoma Statutory and Common law, and Federal common law that are involved in this case

This case involved the following cited matter which has been correctly copied and made a part of the Appendix:

Art. 3, Boundary Treaty of 1819, 3 Stat. 252, Appendix D, page A 53.

Partial Decree Relating to State Boundary, Entered March 12, 1923, in Equity, No. 18, Original, from State of Oklahoma v. State of Texas, United States, Intervenor, 261 U.S. 340, 43 S.Ct. 376, 67 L.Ed. 687 (1923), Appendix E, page A 56.

Oklahoma statutory and common law, Appendix F, page A 60. Title 60 Okla. Stat. Anno. §§335 to 340, inclusive; Willett v. Miller, 176 Okla, 278, 55 P.2d 90; Goins v. Merryman, 183 Okl. 155, 80 P.2d 268; Mapes v. Neustadt, 197 Okl. 585, 173 P.2d 442; Nolte v. Sturgeon, Okl. 376 P.2d 616; State ex rel Com'rs of land Office v. Seelke, Okl. 568 P.2d 650; Cherokee South Corp. v. Ledford, Okl. 603 p.2d 351.

Federal decisional law construing the federal boundary treaty law on Red River, Appendix G, page A87. U.S. v. Texas, 162 U.S. 1, 16 S.Ct. 725, 40 L.Ed. 867, (1896). Oklahoma v. Texas, 260 U.S. 606, 43 S.Ct. 221, 67 L.Ed. 428, (1923).

Extract from Cissna v. Tennessee,
246 U.S. 289, 38 S.Ct. 306, 62 L.Ed. 720,
(1918). Appendix H, page A 94.

Petition for Rehearing to the Court
of Appeals, Appendix C, page A 47.

STATEMENT OF THE CASE AND FACTS
MATERIAL TO THE CONSIDERATION OF
THE QUESTION PRESENTED

This is boundary case. The boundary in question is the south bank of Red River, the interstate boundary between Texas and Oklahoma, which is a political boundary as well as a boundary between land located on each side of the river. The case is a dispute as to its correct location on the ground between land located in Oklahoma and land located in Texas. The Oklahoma side land is situated in Jefferson County, Oklahoma and the Texas side land is situated in Clay County, Texas. The lands in question are located on opposite sides of the boundary. Collectively, the petitioners are the landowners of the land on the Texas side of the boundary and collectively, the respondents are the landowners of the land on the Oklahoma side of the boundary.

The facts material to a consideration of the question presented are found stated in the findings of fact made by the District Court in its opinion, and they are set forth in Appendix B, beginning on page A19 of the Appendix.

The basis of jurisdiction in the District Court over individual defendants was diversity of citizenship--28 U.S.C. §1332(a)--and over United States of America by 28 U.S.C. §§1336 (f) and 2409a.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Rule 17-1-(C) of this Court provides in pertinent part as follows: "When a ... federal court of appeals... has decided a federal question in a way in conflict with applicable decisions of this Court", this Court may grant a writ of certiorari to the Court of Appeals to review its judgment and decision.

Petitioners assert that conflicts, within the meaning of the quoted rule, which are sufficiently substantial, as will be hereinafter made to appear,

require that this Court's supervising discretion be invoked to resolve an asserted conflict between the way the Court of Appeals applied §§ 2, 4, 5, 6, and 7 of this Court's Boundary Decree and the way this Court intended it to be used. The way this Court intended it to be used would give effect to this Court's construction of the Boundary Treaty. This Court's construction of the Treaty will be denied and not given effect by the judgment of the Court of Appeals unless it be reviewed, revised and corrected.

Except for the clarifying closing modification of the District Court's opinion and judgment regarding the scope of the judgment against Texas and Oklahoma, the Court of Appeals approved of the District Court's findings of fact and conclusions of law in *toto*.

Hereinafter, unless specifically noted, the term "court below" refers to and means the approval by the Court of Appeals of the findings, conclusions and judgment of the District Court.

In addition, as was used in the opinions of both Court's below, the Oklahoma side will be referred to N (E) and the Texas side by S (W).

The boundary fixed and determined is along the "wheat field bank". The wheat field bank is located at the foot of a range of hills which fringe the south side of the valley through which the river runs.

The boundary fixed and determined is the exact contention that Oklahoma and the United States made to this Court in Oklahoma v. Texas. See 260 U.S. 606 at page 625, 43 S.Ct. 221 67 L.Ed. 428 (1923).

" . . . Oklahoma and the United States contend that the bank and boundary are at the foot of a range of hills or bluffs which fringe the south side of the valley through which the river runs."

This contention was rejected by this Court at page 631-632 of 260 U.S. The rejection is stated as follows:

". . . we hold that the bank intended by the treaty provision is the water-washed

and relatively permanent elevation or acclivity at the outer line of the river bed which separates the bed from the adjacent upland, whether valley or hill, and serves to confine the waters within the bed and to preserve the course and that the boundary intended is on and along the bank at the average or mean level attained by the waters in the periods where they reach and wash the bank without overflowing it. When we speak of the bed we include all of the area which is kept practically bare of vegetation by the wash of the waters of the river from year to year in their onward course, although parts of it are left dry for months at a time; and we exclude the lateral valleys which has the characteristics of relatively fast land and usually are covered by upland grasses and vegetation, although temporarily overflowed in exceptional instances when the river is at flood."

(Emphasis added.)

The Decree to effectuate the opinion was entered and is reported at 261 U.S. 340, 43 S.Ct. 376, 67 L.Ed. 687 (1923). Later, in 1924, paragraphs numbered 5, 6 and 7 were amplified. The opinion is

reported at 265 U.S. 493, 44 S.Ct. 571, 68 L.Ed. 1118. The Decree to effectuate this opinion is reported at 265 U.S. 500, 44 S.Ct. 573, 68 L.Ed. 1121. The amplification paragraphs are as follows:

The foregoing specifications [paragraphs 5, 6, and 7 of the 1923 Decree] applied in the light of the opinion, admit of, and require the exercise of practical judgment in determining the line intended; but certain fundamentals, such as the following, obviously must form the final basis for the exact location of the line.

"The boundary line is a gradient of the flowing water in the river. It is located midway between the lower level of the flowing water that just reaches the cut bank and the higher level of it that just does not overtop the cut bank. The physical top of the cut bank being very uneven in profile, cannot be a datum for locating the boundary line, but a gradient along the bank must be used for that purpose. The highest point on this gradient must not be higher than the lowest acceptable point on the bank in that vicinity. The boundary has been determined accordingly."

We find nothing in what was thus said which indicates that the commissioners misapprehended the decree or failed to give proper effect to it; and after examining their report and the accompanying maps we think the decree was rightly construed and given full effect. The gradients used as representing the ordinary high and mean levels of the waters, when washing but not overflowing the bank, were not unbroken lines arbitrarily projected from one end of the Big Bend Area to the other, but were broken lines adjusted to prevailing levels in relatively short sections. That course was both reasonable and practical. Within the sixteen miles along that area the river varies in width from 2200 to 6000 feet. Naturally the waters when entering the narrower sections choke and attain higher levels, and when entering the broader sections spread out and fall to lower levels. There is nothing in the decree to prevent a reasonable and practical solution of the problem incident to those varying water levels. And so of the problem incident to the irregularities in the elevation of the bank."

The Oklahoma side bluff, the valley land and hills on the Texas side which fringe the valley are described in the opinion of the District Court. The wheat field bank is therein said to be at the foot of a hill, upon which there rests a wheat field. This quote is from p. 741 of 558 F.Supp; Appendix C, page A20.

". . . The Oklahoma bank of Red River in the disputed areas is a prominent bluff that rises vertically some forty feet or more. The present active channel of the river runs along this bank for most of the distance adjacent to the disputed lands. This channel bed consists of loose sand and is completely devoid of vegetation. It is bounded by low banks, cut into the sand bed of the river ranging upward to approximately three to four feet high above the channel bed. In many areas, the channel has no discernible vertical banks and only a gradual slope as a boundary. The disputed lands extend westward from the channel to the wheat field bank nearly a mile to the west where the surface of the land arises sharply approximately ten feet. The wheat field bank is an erosion bank, formed by the

cutting action of the river when the active channel ran along that bank, and this bank marks the eastern boundary of a cultivated wheat field comprised of land formed from deposits by the river action in recent past geologic time, but which now possess all of the characteristics of fast land. This field has been under constant cultivation for many years and is overflowed only in periods of extreme flooding. To the west of the wheat field is another prominent bank characterized by an outcropping of bedrock rising some twenty feet above the wheat field.

The following quotation from the opinion of the Court of Appeal indicates that it misunderstood the findings of fact made by the District Court. The quote is from p. 125 of 701 F.2d, Appendix A, p. A7.

"... This determination was in accordance with the evidence, and concluded that the south bank (west bank) was what the parties had referred to during trial as the "wheat field bank." This was a cut bank some three to four feet high along the eastern edge of the cultivated field on the western-southern side of the river."

Section 2 of the Boundary Decree, 261 U.S. 340, *supra* provides:

"2. Where intervening changes in that bank have occurred through the natural and gradual processes known as erosion and accretion the boundary has followed the change; but where the stream has left its former channel and made for itself a new one through adjacent upland by the process known as avulsion the boundary has not followed the change, but has remained on and along what was the south bank before the change occurred."

And, the following was said in the opinion at 260 U.S. 631-632 about "adjacent upland":

". . . we hold that the bank intended by the treaty provision is the water-washed and relatively permanent elevation or acclivity at the outer line of the river bed which separates the bed from the adjacent upland, whether valley or hill . . .".

The "adjacent upland, whether valley or hill" is the land that furnishes the earth that comprises the banks inside of which is the river "bed". Under the determination by the courts below, there is no possibility of their being

"adjacent upland" in the valley in the disputed land. Under the boundary as determined in the courts below all valley land is in the "bed" of the river. The only "adjacent upland" on the Oklahoma side is land 40 feet above the valley and is situated east of the bluffs. The only "adjacent upland" on the Texas side is land 10 to 30 feet above the valley and is situated west of the foot of the hills which fringe the valley land. As a result, there could be no "avulsion" in the valley land for the reason that in the valley there would be no "adjacent upland".

It should be noticed, therefore, that the "avulsion" of 1908 found by the courts below is an impossible avulsion for there was no "adjacent upland" through which the avulsive action of the water of the river could operate upon. There is much evidence in the findings of fact in the courts below that there was "adjacent upland in the river valley". It was found that the valley land had timber, grasses, bushes, cultivated land and cattle were grazed thereon.

In reaching the boundary determination, the courts below have the river and its water volume as the guiding standard of decision. Such standard is not provided for by this Court. The river is not the boundary. It is the south bank that is the boundary. The location of the south bank is to be determined by using the flowing water in the river "bed" as the datum. The banks are uneven in their profile and are not a proper datum. The water volume to be used to determine the bank altitude is the average or mean level attained by the waters in the periods where they reach and wash the bank without overflowing it. To determine the water volume that is average or mean, a gradient along the bank must be used. The highest point on this gradient must not be higher than the lowest acceptable point on the bank in that vicinity.

It becomes clear that the Court of Appeals has so substantially departed from the opinions and decrees of this Court that its work must be corrected in order to enforce this Court's construction of the Boundary Treaty of

1819, as expressed in Oklahoma v. Texas. In order to give effect to the Boundary Treaty, it is necessary that this Court require that the Court of Appeals conform its opinion and judgment to the guidelines found stated in this Court's opinions and decrees in Oklahoma v. Texas. To do so requires that this Court use its discretion and issue a writ of certiorari to the Court of Appeals for the Tenth Circuit.

The next conflict arises from a latent application of Oklahoma law by the courts below, (p. 743 of 558 F. Supp., Appendix B, p.31), to a federal question of law inherently required to be used, as this Court held in Cissna v. Tennessee, 246 U.S. 289, 38 S.Ct. 306, 62 L.Ed. 720, (1918), (Appendix H, p. 94), in order to give effect to the Boundary Treaty of 1819 from the action of Red River with respect to changes of its bed and banks.

The consequential conclusion of "avulsion" reached by the courts below cited only Oklahoma law, none involving Red River, in support of the conclusion. All Oklahoma cited cases involved Oklahoma interior rivers. Threshold law

fixes the legal standard of the factual elements of an avulsion. The courts below used Oklahoma law to delineate such threshold law. Oklahoma has a statute, Title 60 sec. 336, Okla. Statutes Annotated, (Appendix F, p. 60-61), which provides in substance that the factual elements of an avulsion are: (1) the new river bed must be formed quickly and suddenly; and (2) the land between the old and new beds must be identifiable. Willett v. Miller, 176 Okl. 278, 55 P.2d 268 (1936), (Appendix F, p. 62) construed this statute, (Appendix F, p. 71), with respect to identification of land between the old and new river beds, to mean that "if the change is so sudden that the owner of land washed away is able to point out approximately as much land added to the opposite bank as he had washed away, the doctrine of avulsion applies. . . ." The Oklahoma Supreme Court in Willett struggled with this Court's opinion and decision in Nebraska v. Iowa and decided that it was not to be followed. (Appendix F, p.67-68.)

Two years later in 1938, in Goins v. Merrymen, 183 Okl. 155, 80 P.2d 268,

(Appendix F, p. 72), speaking about Willett's case not following Nebraska v. Iowa, the Supreme Court of Oklahoma, said:

"But contrary to these holdings, the statute regarding avulsion in this state has been relaxed by judicial construction in the Willett v. Miller. . . ." (Appendix F, p. 75)

In Oklahoma v. Texas, (Appendix G, p. 90), this Court adopted the rules stated in Nebraska v. Iowa, (Appendix G, p. 91-92), where, in that case, the federal law regarding the legal standard of the factual elements of an avulsion on the Missouri were stated.

In substance, they are: In an avulsion the land between the old and new river beds must be identifiable--that is, not destroyed. The idea is carried forth into section 2 of the Boundary Decree of this Court. (Appendix E, p. 97) The new river bed must run through "adjacent upland". "Adjacent upland" is undisturbed, identifiable land.

The facts found by the District Court, (Appendix B, p. 22 et. seq.),

under Oklahoma law, is an avulsion. Under Willett's case, James' remote grantor had as much land between the old and new river beds after the flood of 1908 as he did prior to the flood, even though as the courts below found, that land was "scoured away" by the flood, its vegetation washed away and it was a sand bar of washed in sand during the scouring process. Under section 2 of the Boundary Decree and under the requirements set forth in Nebraska v. Iowa, it failed to have the factual element of undisturbed, identifiable land and could not have been an avulsion.

By using Oklahoma law, when federal law was required, improper effect to the Boundary Treaty from the action of Red River with respect to changes of its bed and banks, has been given.

For the same reasons previously set forth, the discretion of this Court must be invoked to issue a writ of certiorari to the Court of Appeals for the Tenth Circuit.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

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